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No. 99-102

In The

Supreme Court of the United States

JUDY BAAR TOPINKA, STATE TREASURER, STATE OF ILLINOIS,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY and TRUSTEES OF THE COMMONWEALTH EDISON COMPANY SERVICE ANNUITY FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE, THE STATES OF IOWA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, OKLAHOMA, COMMONWEALTH OF PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, AND COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The decision of the Seventh Circuit Court of Appeals, holding that ERISA preempts Illinois' unclaimed property act as to obligations represented by unclaimed pension benefit checks, implicates the unclaimed property laws of the *amici* States. There is no substantive difference between the Illinois statutory provision and that of other States concerning the State's custodial taking of unclaimed property held by an ERISA fiduciary. Almost all of the States have enacted unclaimed property legislation promulgated by the National Conference of Commissioners on Uniform State Laws, either the Uniform Disposition of Unclaimed Property Act (as in Illinois), the Uniform Unclaimed Property Act (1981), or the Uniform Unclaimed Property Act (1995). *See* 1 David J. Epstein, *et al., Unclaimed Property Law and Reporting Forms*, § 5.21[3] (1999). The substance of those laws as applied to unclaimed pension payments is that those obligations would be presumed abandoned and must be delivered into the protective custody of the State if the apparent owner has not communicated or otherwise indicated an interest in the pension payment within the prescribed abandonment period.[1]

Thus, the decision of the Seventh Circuit now calls into question the validity of all State unclaimed property

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[1] *See* Unif. Disposition of Unclaimed Property Act (1954) §§ 7 and 9, 8A U.L.A. 283, 286 (1993); Unif. Disposition of Unclaimed Property Act (1966) §§ 7 and 9, 8A U.L.A. 232, 235 (1993); Unif. Unclaimed Property Act (1981) §§ 2 and 12, 8B U.L.A. 595, 622 (1993); and Unif. Unclaimed Property Act (1995) §§ 2(14) and (15), 8B U.L.A. 100 (Supp. 1999).

laws throughout the United States when applied to uncashed pension benefits held by an ERISA fiduciary. This decision adversely affects the ability of State unclaimed property administrators throughout the United States to search for the missing owners of unclaimed pension benefits and to take custody of these obligations so as to safeguard the rights of the State's citizenry in those benefits, just as the State uniformly does for all other types of unclaimed property. Considering that in 1993 private pension plans held assets exceeding $2.3 trillion and that those assets probably have appreciated substantially in the past few years, even if a very small fraction of those pension funds produced unclaimed benefit payments, those unclaimed obligations would run into the millions of dollars. The Seventh Circuit decision then frustrates the accomplishment of the States' policy and ability to safeguard the interests of its retirees to receive lost or forgotten benefit payments that are due from ERISA fiduciaries to the States' citizens. By doing so, the decision nullifies a long-established State process that is the most meaningful, effective, and successful mechanism for locating owners of unclaimed property.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

In addition to the reasons presented by the Petitioner, the State Treasurer of Illinois, in her Petition for Certiorari, there are two further reasons why the Writ should be granted. First, the decision of the Seventh Circuit Court of Appeals failed to apply two well-established

rules of law that are integral to federalism and to the proper respect for the States' Tenth Amendment reserved power over the disposition of unclaimed property in the best interests of its citizenry. ERISA makes no mention of what disposition is to be made of pension checks that are uncashed after issuance; generally-applicable State unclaimed property laws do. The Seventh Circuit then was required to apply that State law in the absence of any federal provision and to harmonize the federal and State interest. It did neither. Instead, with clear disdain for State unclaimed property law, the Seventh Circuit crafted a novel concept of the interest value of unclaimed funds as justification to evade that State law. The Seventh Circuit substituted its novel concept for the State policy in favor of the location of missing owners of unclaimed property. By doing so, the Seventh Circuit disserves the citizenry by nullifying an accepted, widely-known State process followed through the United States for all forms of unclaimed property, whereby the missing owners of unclaimed property are located and unclaimed property is returned to them. The Seventh Circuit decision makes it much more difficult, if not impossible, for citizens to learn about and reclaim those payments due them from an ERISA fiduciary, because the States would not be the source for information about uncashed pension payments due to its citizenry.

Second, by holding that ERISA preempts State unclaimed property law, the decision of the Seventh Circuit Court of Appeals below unsettles an area of substantive law traditionally regulated by the States in the absence of any federal law or policy that addresses the disposition of such unpaid pension obligations. It directly

conflicts with a decision of the Second Circuit Court of Appeals, which judiciously and conscientiously examined the issue and held that ERISA does not preempt a State unclaimed property law as applied to uncollected drafts for employee benefits. The Second Circuit's explication of the governing legal principles and its rationale for its holding have been recognized and followed by numerous other federal courts in preemption cases arising in various contexts. Considering the decision of the Second Circuit and all of the other courts that have expressed approval of the Second Circuit's rationale, it is reasonable to conclude that ERISA does not preempt State unclaimed property laws. The contrary decision of the Seventh Circuit is irreconcilable with that of the Second Circuit. It now creates confusion and uncertainty in this area of substantive law, requiring a definitive decision from the Supreme Court.

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit Decision Violates State Sovereignty Over the Disposition of Unclaimed Property By Failing to Apply State Unclaimed Property Law to a Matter Unaddressed By Federal Law and By Making No Attempt to Harmonize Federal and State Laws Before Holding the State Law Preempted

While a federal statute, duly enacted pursuant to a grant of powers to the federal government in the Constitution, is the supreme law of the United States, federalism requires that before a federal statute is interpreted to displace traditional State regulation, Congress make an

unmistakably clear legislative statement of its intent to do so. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "[W]here the intent to override [State law] is doubtful, our federal system demands deference to long-established traditions of state regulation." *Id.*, at 546.

From the powers reserved to them under the Tenth Amendment, the States have enacted a comprehensive process for the handling of property presumed abandoned. As the Supreme Court has explained, "States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware v. New York*, 507 U.S. 490, 497 (1993). The Court has recognized that the state's interest in unclaimed property is "as old as the common law itself." *Anderson National Bank v. Luckett*, 321 U.S. 233, 251 (1944). Unclaimed property legislation actualizes "the power of the States to care for the safety of the property of their peoples by such legislation as [the States] deemed appropriate." *Reid v. Colorado*, 187 U.S. 137, 148 (1902). By means of such legislation, the State seeks "to protect the interests of [missing or lost owners] from the risks which attend long neglected accounts." *Anderson National Bank, supra*, at 241. Such legislation embodies the States' public policy in favor of locating and delivering the unclaimed property to the rightful owner, property that may have "remained unclaimed through no fault or lack of diligence on the part of the rightful owners." *State v. Federated Dept. Stores, Inc.*, 175 B.R. 924, 930 (S.D. Ohio 1992).

ERISA is a comprehensive and reticulated statute, enormously complex and detailed. *Hughes Aircraft Co. v. Jacobsen*, 119 S.Ct. 755, 764 (1999). But it does not address

the disposition of unclaimed pension payments issued by an on-going ERISA plan; "[t]he statute does not prescribe any particular procedure for the handling of benefits that are awarded but uncollected, nor does it specify a time limit for honoring such claims." *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 144 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

Where, as here, an ERISA fiduciary challenges the application of a State's general unclaimed property law to unclaimed pension payments, a federal court, mindful of the importance of federalism, has an obligation to follow two rules of law mandated by the Supreme Court. One, while a federal court may not contradict an explicit federal statutory provision, neither can it "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). And two, because "ERISA leaves room for complementary or dual federal and state regulation," a federal court must seek to harmonize or accommodate the federal and State regimes before calling for federal supremacy. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 98 (1993). With quite apparent disdain for State unclaimed property laws, the Seventh Circuit below ignored both of these rules of law.

Underlying the Seventh Circuit decision is the view that the crux of the litigation between the ERISA fiduciary and the State was "who gets to keep the interest" that might be earned on the money to be used to pay the unclaimed pension benefits. *Commonwealth Edison Co. v.*

Vega, 174 F.3d 870, 873 (7th Cir. 1999). But the Commonwealth Edison plan documents made no provision for the payment of any interest on uncashed benefit payments. *Id.* Nowhere in its discussion about the interest value did the Seventh Circuit mention any relevant Congressional intent to enrich the pension fund with unclaimed funds owing to missing plan participants, nor did it cite to any authority that Congress ever contemplated such a matter. Interest value itself provides no principled basis for finding preemption because it is uncertain and speculative; money invested may lose value just as much as it might gain value. Further, in other preemption contexts, the Supreme Court has rejected the "more money" for the fund arguments. *O'Melveny & Myers, supra*, at 88.

Moreover, the Seventh Circuit is wrong in basing its interest value rationale on the assertion that State unclaimed property laws do not provide for the payment of interest to a previously-missing owner. *Commonwealth Edison Co., supra*, at 872; *but see*, for example, Unif. Unclaimed Property Act (1981) § 24(c), 8B U.L.A. 655 (1993). The unclaimed property law of twenty-three States makes provision for the payment of interest; nineteen States provide for interest on all kinds of unclaimed property and four States limit interest to certain kinds.[2]

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[2] Alaska (Alaska Stat. § 34.45.380(d) (Lexis 1998)), Arkansas (Ark. Code Ann. § 18-28-220(b) (Lexis Supp. 1997)), California (Cal. Civ. Proc. Code § 1540(c) (West 1982)), Colorado (Colo. Rev. Stat. Ann. § 38-13-117(3)(a) (West Supp. 1998)), Connecticut (Conn. Gen. Stat. Ann. § 3-70a(d) (West Supp. 1999)), Idaho (Idaho Code § 14-524(3) (1999), Louisiana (La. Rev. Stat. Ann. § 9:193 (West. Supp. 1999)), Maine (Me. Rev. Stat. Ann. tit.33, § 1962 (West 1999)), Maryland (Md. Code Ann. Com.

The underlying rationale of the Seventh Circuit about the interest value would then be inapplicable in these States. Nonetheless, the Seventh Circuit decision, by casting a cloud on the laws of these States, only fosters further litigation to determine what effect, if any, it has as persuasive authority for ERISA preemption in these jurisdictions.

The interest value argument overlooks the real and important basis for State unclaimed property law, the obligation of the State to search for the missing owner and to deliver to that owner the property or funds to which the owner is lawfully entitled. The real issue in this case is not whether ERISA preempts State law so that an ERISA plan gets to keep the interest value of monies due to missing beneficiaries, but whether ERISA preempts a State law that mandates search procedures for locating the missing beneficiaries. While the Seventh Circuit believed it to be more important to insure that a missing beneficiary's monies remained unclaimed so that those

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Law § 17-314 (1994)), Massachusetts (Mass. Ann. Laws. ch. 200A, § 10(e) (Law. Co-op. 1994)), Michigan (Mich. Stat. Ann. § 26.1055(25)(3) (Lexis 1999 Supp.)), Mississippi (Miss. Code Ann. § 89-12-39(3) (Supp. 1998)), Missouri (Mo. Ann. Stat. § 447.565(2) (West Supp. 1999)), New Jersey (N.J. Stat. Ann. § 46:30B-79 (West 1989)), New Mexico (N.M. Stat. Ann. § 7-8A-11 (Lexis 1998)), New York (N.Y. Aband. Prop. Law § 1405 (McKinney 1991)), Rhode Island (R.I. Gen. Laws § 33-21.1-24(c) (1995)), South Carolina (S.C. Code Ann. § 27-18-250(c) (1991)), Tennessee (Tenn. Code Ann. § 66-29-117(b) (1993)), Virginia (Va. Code Ann. § 55-210-21(c) (Lexis 1995)), Washington (Wash. Rev. Code Ann. § 63.29.240(3) (West 1997)), West Virginia (W.Va. Code § 36-8-11(2) (1997)), and Wisconsin (Wis. Stat. Ann. § 117.24(3) (West 1997)).

monies could be enjoyed by others, State unclaimed property laws place importance on efforts to insure that the beneficiary is located and paid.

State unclaimed property programs are remarkably successful in locating missing owners of unclaimed property delivered into the protective custody of the State. Illinois' unclaimed property act, like that of all of the other States, provides for wide-spread publication of the names of missing owners. *People ex rel. Callahan v. Marshall Field & Co.*, 404 N.E.2d 368, 369 (Ill. App. Ct. 1980). As explained by the Oregon Supreme Court, "[p]rovision is made for publication of notice for the purpose of finding the true owner of the property and for the owner to redeem it by a comparatively simple process." *State ex rel. Mallicoat v. Coe*, 460 P.2d 357, 358 (Or. 1969). Consistent with their statutory obligations to the missing owner, States also use other locating efforts, including researching national databases to find a change-of-address; matching unclaimed property information with data on State motor vehicle and income tax records to locate a more current address; maintaining searchable databases of unclaimed property records on the Internet; operating outreach programs at State and county fairs, shopping malls, and senior citizen centers to inform about the State program and to assist in searching the State's records; distributing unclaimed property owner listings to local legislators and officials; and conducting individual investigations to trace a missing owner. Thus, State unclaimed property laws provide the most meaningful and effective mechanism to locate the missing beneficiary entitled to an unclaimed pension payment.

ERISA contains no provision requiring an ERISA fiduciary to attempt to locate a missing participant who has failed to cash a benefit payment check. In this case, the record does not show that the Commonwealth Edison fiduciaries took any steps to locate beneficiaries who had not cashed their benefit payments. The record shows that Commonwealth Edison simply wrote-off these outstanding checks. Because ERISA is silent as to the disposition of unclaimed pension benefits in these circumstances, State unclaimed property laws can be readily harmonized with the federal statute. The search efforts made by States under unclaimed property laws essentially pick up where ERISA leaves off.

Further demonstrating the mesh of federal and State law in this area of unclaimed property is a recent amendment of ERISA that addresses the disposition of benefits due to beneficiaries that cannot be located when a single employer plan terminates. The Retirement Income Protection Act of 1994 added a new section that requires a terminating pension plan to transfer the benefits due to a missing participant to the Pension Benefit Guaranty Corporation or purchase from an insurance company an irrevocable commitment to pay the benefits. P.L. 103-465, § 776, 103 Stat. 5047, 29 U.S.C. § 1350. This provision addresses a situation that is not covered by State unclaimed property laws. State law raises a presumption of abandonment upon expiration of a period of years after property is payable or distributable. It cannot govern the disposition of property that is unclaimed immediately following a plan's termination, but before the abandonment period expires.

At the same time, it is significant that in 1994 Congress chose to legislate regarding unclaimed benefits only where State law cannot govern, while leaving untouched the prevailing law that ERISA does not preempt State unclaimed property law as held by the Second Circuit in *Aetna Life, supra,* in 1989. As has been stated by the Third Circuit Court of Appeals, where Congress acts upon a federal statute, it is presumed that "Congress is aware of existing judicial interpretations of statutes." *Scheidemann v. I.N.S.*, 83 F.3d 1517, 1525 (3rd Cir. 1996). At the time of the enactment of the Retirement Income Protection Act of 1994, Congress then is presumed to have been aware of the *Aetna Life* decision. Because Congress chose only to address an unclaimed property situation not addressed by State law, the Second Circuit's decision stands as harmonious with the congressional intent.

By ignoring State sovereignty and the constraints of federalism, and by failing to apply State unclaimed property laws in a situation not governed by federal law, the Seventh Circuit has itself crafted an exception to what otherwise was a unitary scheme followed throughout the United States for the handling of all forms of unclaimed property. In doing so, the Court disserves the States' citizens. Through the publicity attending unclaimed property programs and the States' own outreach efforts, the citizenry is now well aware that the States serve to protect the citizens' interest in abandoned or unclaimed property, and that the citizen can always look to the States as the source for information about property due to the citizen. The Seventh Circuit decision nullifies this State program. It leaves plan participants or beneficiaries with no ready resource to locate uncashed payments of

which they may be unaware and thus have no way of knowing where to look. In place of an effective State program, the Seventh Circuit's decision only crafts for an ERISA plan "a charmed existence never contemplated by Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

II

The Decision of the Seventh Circuit Court of Appeals Upsets the Widely-Accepted Holding that ERISA Does Not Preempt State Unclaimed Property Laws, Based Upon the Decision of the Second Circuit Court of Appeals in *Aetna Life Insurance Co. v. Borges*

Aetna Life Insurance Co. v. Borges, 869 F.2d at 149, was a case involving ERISA preemption of a Connecticut unclaimed property provision that is not materially different from that of Illinois. Starting with the presumption that the historic police powers of the State are not preempted unless Congress makes clear and manifest its intention to do so, and after considering all aspects of the effect of State unclaimed property laws upon an ERISA plan, the Second Circuit held that "ERISA does not preempt Connecticut's escheat law as it applies to uncollected drafts for employee benefits." It concluded that "[a]bsent more specific direction from Congress, [the Court] can safely assume that Congress did not intend to create [for ERISA plans] an exception to this traditional exercise of state authority." *Id.*, at 147-48.

The Circuit Courts of Appeals, in cases involving ERISA preemption in various contexts, have acknowledged the persuasiveness of the explication of the rules of law and the rationale of the Second Circuit concerning

ERISA preemption of State unclaimed property laws; for example,

- First Circuit: This Circuit Court stated that in *Aetna Life* the Second Circuit found that a State escheat law did not "relate to" ERISA plans and noted that ERISA does not preempt many laws that have a minimal, indirect impact on plan administration. *Combined Management, Inc. v. Superintendent of Bureau of Insurance*, 22 F.3d 1, 7 (1st Cir. 1994).

- Fourth Circuit: This Circuit Court explained that in *Aetna Life*, the Second Circuit held that "state escheat law [was] not preempted," and cited it for the proposition that run-of-the-mill State law claims are not preempted even though such claims obviously affect and involve an ERISA plan and its trustees. *Custer v. Sweeney*, 89 F.3d 1156, 1166 (4th Cir. 1996).

- Fifth Circuit: This Circuit Court explained that the holding in *Aetna Life* was that "ERISA does not preempt application of state escheat law to benefit checks and drafts." *Matter of Dyke*, 943 F.2d 1435, 1447 (5th Cir. 1991).

- Sixth Circuit: This Circuit Court explained that in *Aetna Life*, the Second Circuit held that "Connecticut's escheat law was not preempted by ERISA because it had no effect on the employer's 'original determination of an employee's eligibility for benefits,'. . . . " *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 341 (6th Cir. 1993).

- Eighth Circuit: This Circuit Court commented that in *Aetna Life*, the Second Circuit

"found that state [escheat] statutes affecting benefit distribution did not 'relate to' ERISA plans." *Boyle v. Anderson*, 68 F.3d 1093, 1104 (8th Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996).

- Ninth Circuit: This Circuit Court stated that in *Aetna Life*, the Second Circuit held that "ERISA does not preempt state escheat law of abandoned property as it applies to uncollected drafts for employee benefits." *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1504 (9th Cir. 1993).

- Tenth Circuit: This Circuit Court cited *Aetna Life* as "upholding general escheat law that affected ERISA benefit plans." *National Elevator Industry, Inc. v. Calhoun*, 957 F.2d 1555, 1558 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992).

Similarly, other federal courts have indicated their understanding that ERISA does not preempt State unclaimed property laws. For example, a Third Circuit district court explained that in *Aetna Life*, "Connecticut's escheat law applied to all types of abandoned property, and it was insignificant that the abandoned property in th[at] particular case consisted of the benefits provided under a plan covered by ERISA." *United Wire, etc. v. Morristown General Hospital*, 793 F.Supp. 524, 534 (D.N.J. 1992), *rev'd*, 995 F.2d 1179 (3rd Cir.), *cert. denied*, 510 U.S. 944 (1993). And an Ohio district court explained that in *Aetna Life*, the Second Circuit "held that the indirect economic and administrative effects that state abandoned property laws may have on an employee benefit plan are not substantial enough to give rise to preemption by ERISA." *State v. Federated Dept. Stores, Inc., supra*, at 929.

The totality of all of these cases demonstrates that it was understood that ERISA does not preempt State abandoned or unclaimed property laws (custody laws), not just absolute escheat laws (as explained in Illinois' Petition herein), and not just as to employee welfare plans. In accord with this understanding, in promulgating the 1995 Uniform Unclaimed Property Law, the Conference of Commissioners on Uniform State laws, relying on *Aetna Life*, commented that the 1995 Uniform Unclaimed Property Act "presumes that [a State unclaimed property act] is not preempted by ERISA." Unif. Unclaimed Property Act (1995) § 2 cmt, 8B U.L.A. 101 (Supp. 1999). Thus, the Seventh Circuit decision below stands as the only instance where a court has held that the ERISA preempts State unclaimed property laws.

Additionally, the persuasive authority of *Aetna Life* cannot validly be undercut by asserting that it involved (1) insurance reserve funds, not pension assets, and (2) welfare benefit plans, not pension plans subject to ERISA's anti-alienation provision. Both are distinctions without substantive difference as to the preemption analysis.

The concern for plan assets derives from ERISA's exclusive benefit provision, which requires that assets "shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). As the Eighth Circuit Court of Appeals has found, "[t]he ERISA exclusive benefit provision does not prohibit every indirect benefit to people other than plan beneficiaries." *Boyle v. Anderson, supra*, at 1103. The congressional intent was

to make the law of trusts applicable to ERISA plans and to eliminate such abuses as self-dealing, imprudent investing, and misappropriation of funds. *Id.*, at 1102. In accord, the Tenth Circuit Court of Appeals has found that "[t]he anti-inurement or 'exclusive benefit' policy of section 403(c) of ERISA is intended to 'protect participants' expected payments' by preventing employers from diverting funds to themselves." *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995), quoting *Outzen v. FDIC*, 948 F.2d 1184, 1188 (10th Cir. 1991). Congress "was not concerned with whether persons not covered by ERISA plans were somehow benefited by the operation of the plans." *Boyle v. Anderson, supra*, at 1102. Thus, any argument that compliance with unclaimed property laws would constitute the use of plan assets other than for the exclusive benefit of participants "stretches ERISA's exclusive benefit provision beyond the boundaries intended by Congress." *Id.*

Neither does the anti-alienation provision for pension funds provide a meaningful distinction undermining the authoritativeness of the *Aetna Life* decision. That provision only requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). As the Second Circuit Court of Appeals has found, "[t]he purpose of the proscription on alienation and assignment is to protect an employee from his own financial improvidence in dealings with third persons." *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 124 (2d Cir. 1979). The anti-alienation provision shields only "the beneficiaries' interest under the pension plan from third-party creditors." *Coar v. Kazimir*, 990 F.2d 1413,

1421 (3d Cir.), *cert. denied*, 510 U.S. 862 (1993). In contrast, the Eighth Circuit Court of Appeals has also found that "state garnishment and escheat statutes do not shift control over benefit distribution" and "[n]either do they negate a proper ERISA provision." *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341, 1347 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992). Thus, Congress did not intend for ERISA to preempt a State law that assures to plan participants payment of the very benefits that ERISA prevents from being assigned or alienated.

Furthermore, in the unclaimed property law context, the Supreme Court itself has described the State's role as that of "a conservator" of a missing person's property. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948); *Anderson National Bank, supra*, at 241. Undoubtedly, no one would reasonably argue that ERISA preempts State laws that provide for the appointment of a conservator for an incompetent or incapacitated plan participant or beneficiary or that distribution to such a fiduciary on behalf of the conservatee violates the exclusive benefit or anti-alienation provisions. Because the State functions as a fiduciary for a lost or missing participant, *a fortiori* it cannot reasonably be argued that State unclaimed property laws violate these ERISA provisions.

Because no substantive distinction can be drawn between the unclaimed property statute involved in *Aetna Life* and in this case, nor between an employee welfare plan and an employee pension plan, the decision of the Seventh Circuit irreconcilably conflicts with that of the Second Circuit in *Aetna Life* and those cases that have indicated its authoritativeness. Thus, the Seventh Circuit decision creates confusion and uncertainty in this area of

the law. What the Supreme Court concluded in *California Div. Of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, is equally applicable here: "[a] reading of § 514(a) resulting in the preemption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say [is] 'unsettling.' " 519 U.S. 316, 330 (1997), quoting *NY Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 665 (1995). The Seventh Circuit decision will inevitably lead to further litigation between ERISA fiduciaries and State unclaimed property administrators in federal courts throughout the United States.

CONCLUSION

The *amici* States urge the Supreme Court to grant the Writ of Certiorari as sought by the Petitioner, the State Treasurer of Illinois, and then to reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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